

## The Constabulary Function Dilemma

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In November 1997, a Texas poll on the question of illegal immigration reported that slightly over half of those queried favored using "troops to help seal the border with Mexico."<sup>1</sup> That indicator of public attitudes, along with the appearance of pseudo-militia in the United States in the mid-1990s, highlights a persistent and often-ignored dilemma that has occurred throughout US history—the sometimes fuzzy role of regular forces and the National Guard (NG) in maintaining public order.<sup>2</sup>

While the pseudo-militia might find and evoke colonial-era and early republic precedents for their current existence, they downplay such comparison. Perhaps they do so because that would also throw the differences between actual militia and their "posturing" into sharp relief. In any case, the *constabulary quandary*, like pseudo-militia, has erupted again and again in US history.

### Militia Legacy

Like many other public policy problems, the constabulary problem has been dealt with in the heat of crisis, then quickly forgotten. While some historians have examined the quandary in such contexts as militia-NG politics or late 19th-century labor wars, the tension between the roles of citizens-in-arms and the constabulary lies along the margins of defense studies.<sup>3</sup> That it does so is especially curious given Dean of American Military Sociology Morris Janowitz's urging a generation ago to look more closely at the problem. For whatever reason, it has been more carefully traced in early US regional history and legal scholarship.<sup>4</sup>

Perspectives on the constabulary

function are also blurred by the different ways in which mechanisms of public safety and order have been structured throughout the world. In the United States and the United Kingdom, excluding Canada, other than various police "special units" and some state police, highway patrol or state NG units, no substantial public, paramilitary security force stands ready to augment local police except the Armed Forces. On the other hand, some nations, including France, Italy and Russia, have large national police forces that are a combination of military and civilian jurisdiction.<sup>5</sup>

Although in many nations paramilitary forces back authoritarian regimes, the same is true of standing armed forces in many other countries. Some confusion arises from the fact that, in recent years, militia which look more like those idealized in 17th- and 18th-century revolutionary "people in arms" concepts have appeared in Lebanon and Bosnia. At the same time, a convergence of forces—police professionalism, drug wars and the 1960s' and 1970s' riots—have led to substantial militarization in US police styles and practices.

### Militia as Police Forces

The drafters of the *US Constitution* did not address the police question. During the first generations of the American Republic, the burden of maintaining order in extreme situations fell on the militia. (English Prime Minister Robert Peel's "Bobbies" lay half a century ahead in the flow of history.)

Historian Jerry Cooper notes that, as a result of the militia's policing role, over the next two centuries state officials turned to the

US government for military assistance when the National Guard, which as a "constabulary [was the] last organized agency of force within the states to suppress disorder, failed."<sup>6</sup> US presidents usually committed federal units in response to such requests. But in a few cases, states dispatched militia on their own initiative, such as, most dramatically, during the 1794 Whisky Rebellion, the Nullification Controversy during President Andrew Jackson's administration, the 1877 railroad strike and the 1950s' school-integration riots.

If we see such events as historical patterns, it is not surprising that the 1990s' pseudo-militia envision themselves as modern counterparts to an older generation's standing forces. The anti-federalists, including Thomas Jefferson, favored such a view, which clashed with Alexander Hamilton's and George Washington's concept of the militia as a bastion of civil order. For example, clashes between militia and anti-militia took place during the colonial era—Bacon's (1678) and Leisler's (1689) rebellions—and a century later, the insurgencies that erupted under the weak central government created by the *Articles of Confederation*.

The most dramatic of such rebellions was Shay's Rebellion in Massachusetts. The courts and legislatures were threatened by armed mobs trying to block foreclosures, claiming the status of militia, but who were mainly local farmers and tradesmen, although many, it is true, were Revolutionary War veterans.<sup>7</sup> In late January 1787, regulars and militia from adjacent states dispersed the rebels, and the affair was smoothed over. That breakdown in public order and the

constabulary function of regular forces and militia were in sharp focus when the Constitutional Convention convened. Some leaders expected such insurgencies would continue or interstate wars would break out.<sup>8</sup>

### Militia or an Armed Force?

These cross-tensions offer perspective on the Second Amendment's nebulous language. As with other issues between federalists and anti-federalists, the Constitution's militia clauses were a product of compromise. The federalists favored the Second Amendment's reference to the militia being "well-regulated" but were willing to give some leeway.

Hamilton felt that the militia's image as a "national bulwark" was a myth that had almost "lost our independence . . . and cost millions."<sup>9</sup> Two centuries later, historian Charles Royster, in pointing out that many outspoken rebels avoided military service during the Revolution, agreed that the war had dragged on for eight years "partly because of the revolutionaries' failure to contribute by physical force or material interest to the winning of American independence."<sup>10</sup>

The federalist perspective was also reflected in other constitutional articles. The president was to be commander in chief of the "Army and Navy of the United States and of the militia of the several states, when called into the actual service of the United States."<sup>11</sup> Congress would raise and support armies and set rules and regulations for their governance. It was to "provide for calling forth the militia to execute the Laws of the Union, suppress insurrection and repel invasions" and "for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States."<sup>12</sup> The *Militia Act* and the 1792 *Calling Forth Acts* defined the militia as "citizens of the respective states . . . organized as the legislature of each state

shall direct," required able-bodied males from 18 to 45 years of age to stand ready for call-up with designated military weapons and equipment and set forth procedures for the president to mobilize militia.<sup>13</sup>

The new government's will and capacity to react to insurgency was tested two years later during the Whisky Rebellion. In western Pennsylvania, angry farmers and their supporters protested a federal tax on whisky by marching as militia through cities and towns. A force roughly equivalent to 13,000 federal troops and militia from other states under federal commanders soon dispersed the mob. Because of the incident, Congress passed the *Militia Act of 1795*.

That act, by increasing call-up powers and allowing militia to help enforce federal laws against reluctant states, further strengthened federal constabulary authority. In 1807, Congress officially named the regular Army as the enforcer of federal laws.<sup>14</sup> Despite such increases in federal authority and control, the English Whig anti-federalist view of the militia as the nemesis of tyranny persisted in political rhetoric. At the same time, class tensions were reshaped by the dropping of property ownership as a requirement for the right to vote.

The theme of standing forces as a tool of tyrants continued to be visible in political rhetoric and action into the next century. In the early 1820s, despite the many militia defeats and failures during the War of 1812, Congress squashed Secretary of War John C. Calhoun's proposal for an "expandable Army" of regulars that would serve as the core around which masses of volunteers would be mobilized.<sup>15</sup>

Andrew Jackson was the embodiment of the image of the militia as a populist bastion during the "democratic revolution." Much was made of his service as a general of volunteers and, later, the regular Army. He also commanded militia and some regulars

in victories over the Creek Indians at the 1813 Battle of Horseshoe Bend in Georgia and over the British regulars at New Orleans in early 1815. It mattered little that "Old Hickory" was a harsh disciplinarian in the field. As president, he sternly wielded the regular Army in a federalist manner against South Carolina's government and militia during the Nullification Controversy and gave state militia short shrift in federal funding.

At the same time, other trends—from urbanization to rising tensions over slavery—increased the use of both regulars and militia as constabulary. From the early 1800s on, the states reduced general militia funding and concentrated their resources on small numbers of first-line forces. Federal subsidy of state militia remained at the same level from 1792 to 1881.

In the South, slave patrols served as a semiofficial constabulary. Throughout the rest of the nation, from the 1820s to the Civil War, hundreds of social pseudo-militia were formed "independently of the statewide system" but under state authority.<sup>16</sup> Essentially social and ceremonial, many groups acted as constabulary in emergencies or helped watchmen and reinforced the first urban police forces.<sup>17</sup>

"Aid to the civil" included providing aid during ethnic, labor and anti-slavery riots and helping federal authorities pursue and transport fugitive slaves. In the 1842 Nat Turner slave rebellion in Virginia, regular officers rushed to aid local forces, ignoring legal niceties. In the mid-1850s, federal authorities moved more cautiously when vigilantes took over San Francisco and when a proto-civil war broke out in Kansas.

During the period, there were three dramatic cases of troops serving as constabulary: the 1846 anti-Catholic riots in Philadelphia, the US Marine Corps' 1859 capture of abolitionist John Brown at Harper's Ferry and the quelling of the 1863 New York draft riots by

federal troops fresh from the Battle of Gettysburg. The deployment of militia and social units lay far from the old view of militia as the citizens-in-arms. This was also the case when federal marshals' called on military forces of all kinds as a *posse comitatus* in enforcing the *Fugitive Slave Law* under the "Cushing Doctrine," wherein Caleb Cushing, President Franklin Pierce's attorney general, decreed that all citizens were required to support federal officers when asked.<sup>18</sup>

During the 1865 to 1877 Reconstruction era, the constabulary function of both regulars and militia became the pivot of protracted conflict in the South. When the Union Army first began the occupation, white militia were outlawed. As federal forces shrank, governors relied on black militia for local security, including guarding balloting sites.

In the late 1860s, black militia and flying squads of regular cavalry struggled to deal with the rising tide of armed dissidence, which spread terror and intimidation, usually furtively. Some insurgents, acting by night, wore hoods resembling those of the old slave patrol; others, such as the "Red Shirts" in Alabama, bore arms openly and drilled in public.

### ***Posse Comitatus Act***

Somewhat ironically, as federal forces began their withdrawal from the South after the Compromise of 1877, the militia constabulary role was inadvertently augmented by Congress with the passage of an amendment to the *Army Appropriations Bill of 1877*, later known as the *Posse Comitatus Act*. The act prohibited regular military forces from policing civilians except under martial law.<sup>19</sup>

The *Posse Comitatus Act* came just as labor disturbances began to mount sharply, cresting in 1903.<sup>20</sup> For two generations and in many parts of the nation, relations between citizen-soldiers and workers were poisoned. In the late 19th

century, some labor unions called for a "repeal of post-Civil War militia reforms and a return to the antebellum . . . decentralized, locally controlled volunteer militia." Others demanded outright abolition of such forces.<sup>21</sup>

The *Posse Comitatus Act* also left federal authorities in US territories and along the frontier with only a small federal marshal force to deal with disturbances.<sup>22</sup> Nevertheless, federal constabularies, such as Indian reservation police and colonial paramilitary police forces, including the Samoan "Fita-fita" and the Philippine constabulary, formed in various regions.

In 1917, mounting anxiety over sabotage and disorder led to the recruitment of over 80,000 men into state Guard forces as well as into a NG force of almost 30,000—a pattern that recurred early in World War II and in the late 1970s.<sup>23</sup> On a parallel track, from the 1920s forward, the appearance of mass-produced motor vehicles and the proliferation of highway systems led to founding or increasing state police forces, some of them having military-like structures.

Between the world wars and throughout the Cold War, the National Guard, organized under regular Army and Air Force standards and control, came to be almost wholly funded by the federal government. When the National Guard served state governments as a constabulary force in emergencies, natural disasters, riots, strikes or crowd and traffic control, the states monetarily reimbursed federal authorities.

Chronic tensions surrounding various issues between regular forces and the National Guard usually remained out of the public view. However, there were times when they were too visible, because of various court decisions that occasionally took center stage. For example, during the Little Rock, Arkansas, race riots in 1957, President Dwight D. Eisenhower reluctantly federalized the National Guard and ordered the US Army

101st Airborne Division to the scene to enforce the federal court order.

When the implications of the *Posse Comitatus Act* were debated, the federal marshal program was strengthened to create an alternative to using Armed Forces as constabulary. The ambiguities thrown into relief by Eisenhower's action in Little Rock were left unresolved as NG leaders focused on supporting active forces in fending off many proposals made since World War II that the guard play "a home-front constabulary" role.<sup>24</sup>

### **National Guard Roles in Recent Riots**

The winds of fate soon shifted, forcing a sharp change in course. In early 1965, as the Vietnam War escalated, President Lyndon B. Johnson rejected the joint chiefs' urging that the Guard be called up. Then, in August, the Watts, California, riot pushed the constabulary role back to center stage, where it remained until the early 1970s as it dealt with dozens of outbreaks of violence in ghettos and on college campuses.

In 1967, in media advertisements, the National Guard Association stated its intent to reclaim the constabulary role. This was especially ironic because Secretary of Defense Robert McNamara had proposed merging the NG and Army Reserve components, which would have left state governors without immediate access to military forces to use as backup for local authorities during emergencies.

As with earlier US crises, the prolonged domestic unrest led to increased federal involvement. The Army's Military Police School trained civilian police agencies in riot control, while various federal agencies provided new methods and weaponry, including paramilitary Special Weapons and Tactics (SWAT) teams. In the late 1960s, Pentagon contingency plans reportedly anticipating pitched battles, on the scale of the Battle of Stalingrad,

in US cities against insurgents. But as rioting and related tensions eased in the mid-1970s, the constabulary function once again fell into the shadows.

### National Guard Role in "War on Drugs"

In the 1980s, amid mounting public concern about rising violent crime rates and drug trafficking, military resources were once again brought into play. In the "War on Drugs," active Armed Forces were ostensibly limited to communications and sensing support, while the National Guard and Coast Guard, outside the law's constraints, played a more "hands-on" role.

The Cold War and the War on Drugs intensified, but there was no public protest in 1981 when Congress modified the century-old *Posse Comitatus Act* or when state governors and congressmen tried to block President Ronald Reagan's use of guardsmen in Central America to support various insurgency and counterinsurgency operations. The courts rejected their protests. However, the question of a state's need for an armed force remained.

In 1990, Supreme Court Justice John Paul Stevens highlighted the nature of the duality conflict. He acknowledged that states might circumvent clashes with the federal government over control of the National Guard-as-militia by forming "at their own expense a defense force . . . exempt from being drafted into the Armed Forces of the United States."<sup>25</sup> This decision showed how federal the National Guard had become and how thin the residue of the old militia was.

Also at issue was some judicial ambiguity over the *Constitution's* provision that "no state shall, without the consent of Congress . . . keep troops, or ships of war in times of peace."<sup>26</sup> At the same time, the defense buildup and mounting fears of a major war with the Soviet Union led some states to strengthen, create or re-form state NG forces.

### What Role in the Future?

The War on Drugs also threw other anomalies into relief. While the tangle of paramilitary elements within federal agencies and the Armed Forces' suborganizations, which were involved in that struggle, was complex enough, the complexities paled when compared with the far more intricate maze of local and regional police entities. "Join marks" were patched temporarily by memoranda of understanding and conferences but left confusing precedents in their wake.

Personnel turnover, unclear roles and a conflict of jurisdictions added to the disarray and spotlighted how the constabulary meant many things to many people. And, of course, the tangle of forces and jurisdictions gave a great advantage to drug traffickers.

As academically interesting as tracing the roots of this bewildering state of affairs might be, it has become much more of a "real-world" concern as pseudo-militia claim to be counterparts of past militia as the call continues for reducing the National Guard on the premise it is "an anachronism in an age dominated by complex warfare and sophisticated weapons"; and as the debate concerning the National Guard's constabulary role continues.<sup>27</sup>

The attention this subject is now receiving does not mean this complex matter has been brought into sharper focus. The constabulary question might once again drift from view, leaving ambiguous policies and thorny issues unresolved. If the subject is left to fate, fortune might not always reward such indifference as generously as it has in the past.<sup>28</sup>

### NOTES

1. Thaddeus Herrick, "Poll Finds Many Texans Want Troops on Border," *Houston Chronicle*, 17 November 1997, 1A, 4A.
2. For example, see Martin Binkin and William Kaufman, *U.S. Army Guard and Reserve: Rhetoric, Realities, Risks* (Washington, DC: Brookings Institution, 1989). For varying estimates of size, see "Disgruntled Citizens Joining 'Unorganized' Militias," *San Antonio Express*, 19 March 1995, 15A. See also Anti-Defamation League, *Beyond the Bombing: The Menace Grows* (Washington, DC: B'nai B'rith, 1995).
3. Marth A. Derthick, *National Guard in Politics* (Cambridge, MA: Harvard University Press, 1965); Robert Bruce Sligh, *The National Guard and National Defense: The Mobilization of the Guard in World War II* (New York:

Praeger, 1992). See also Jerry M. Cooper, *The Army and Civil Disorder: Federal Military Intervention in Labor Disputes, 1877-1900* (Westport, CT: Greenwood Publishing, 1980).

4. An exception is Samuel G. Newland, "Whose Guard Anyway?" *Parameters* (June 1988).

5. An analysis of such institutions in the context of British internal security problems is found in Drusilla Wiffen and Martin Edmonds, "La Gendarmerie Nationale: A Blueprint for the Future of Internal Security Provision in the West," Unpublished paper. No date.

6. Cooper, 16.

7. Quoted in North Callahan, *Henry Knox: George Washington's General* (New York: Rinehart & Co., 1958), 245.

8. C. Joseph Bernardo and Eugene H. Bacon, *American Military Policy: Its Development Since 1775* (Harrisburg, PA: Stackpole Press, 1961), 66-70; Russell Frank Weigley, *History of the United States Army* (New York: Macmillan, 1967), 83-85; Robert W. Coakley, *The Role of Military Forces in Domestic Disturbances, 1789-1878* (Washington, DC: Center for Military History, 1988), 4-7; Richard H. Kohn, *Eagle and Sword: The Federalists and the Creation of the Military Establishment in America, 1783-1802* (New York: Free Press, 1975), 74 and 75.

9. Don Higginbotham, *The War of American Independence: Military Attitudes, Policies and Practice, 1763-1789* (New York: Macmillan, 1971), 453-57. See also Jacob E. Cooke, ed., *The Federalist* (Middletown, CT: Wesleyan University Press, 1961), 161-62.

10. Charles Royster, *A Revolutionary People at War: The Continental Army and American Character, 1775-1783* (Chapel Hill, NC: University of North Carolina Press, 1996), 320, 367.

11. *US Constitution*, Article 11, Section 2, Clause 1.

12. *Ibid.*, Article 1, Section 8, Clauses 12, 14, 15 and 16.

13. For a discussion in apposition to the citizens-in-arms as checks-and-balances argument, see Wilbur Edel, *Gun Control: Threat to Liberty or Defense Against Anarchy?* (Westport, CT: Praeger Publishers, 1995), 62 and 63.

14. Weigley, 87.

15. *Ibid.*, 139-43.

16. *Ibid.*, 69-101.

17. Marcus Cunliffe, *Soldiers and Civilians: The Martial Spirit in America, 1775-1865* (New York: The Free Press, 1973), 218, 236 and 248.

18. Coakley, 92-95, 128-167.

19. 10 *US Code* 1385.

20. For an overview, see Sidney Lens, *The Labor Wars: From the Molly Maguires to the Sitdowns* (Garden City, NJ: Anchor Books, 1974).

21. Cooper, 14.

22. See William A. Keleher, *Violence in Lincoln County, 1869-1881* (Albuquerque, NM: University of New Mexico Press, 1957), 155-56.

23. John K. Mahon, *History of the Militia and the National Guard* (New York: Macmillan, 1983), 157. See also "What Sort of Home Guards?" *New Republic* (14 April 1941), 517-18.

24. Jim Dan Hill, *Minuteman in Peace and War* (Harrisburg, PA: Stackpole Press, 1964), 218.

25. Quoted in Sligh, 168.

26. *US Constitution*, Article 1, Section 10.

27. Bradley Graham, "National Guard Digs In for a Fight on Its Roles, Future," *Houston Chronicle*, 20 October 1997, 4A.

28. Beaumont gratefully acknowledges James Burk, Ph.D., Texas A&M Sociology Department, for helpful comments and suggestions for this article.

Roger A. Beaumont is a professor in the Department of History, Texas A&M University, College Station, Texas. He received a B.A. and an M.A. from the University of Wisconsin and a Ph.D. from Kansas State University. He served in the Active Army, the Army National Guard and the Army Reserve from 1957 to 1959 and during the Berlin Crisis from 1961 to 1962. He is the cofounder and North American editor of *Defense Analysis*, 1983-89. He has written 11 books and monographs and over 80 book chapters and articles. He has also lectured on military affairs at several senior service schools.